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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO.: 34497-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MYSTIE "PATSY" MICHAEL,

Appellant,

vs.

BRIGHT NOW! DENTAL, INC., a Washington Corporation,

Respondent.

**FILED**  
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PETITION FOR REVIEW

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**I. IDENTITY OF PETITIONER**

Petitioner is defendant Bright Now! Dental, Inc. ("BNDI").

**II. CITATION TO COURT OF APPEALS DECISION**

Petitioner seeks review of the decision filed by Division Two of the Washington State Court of Appeals on August 14, 2007, No. 34497-1-

II. A copy of the published 2-1 decision is appended to this Petition.

**III. ISSUES PRESENTED FOR REVIEW**

1. Does a personal injury cause of action fall outside the scope of the Washington Consumer Protection Act (CPA), RCW 19.86, *et seq.*, where the sole claim is for emotional distress and the record contains no evidence of injury to business or property?

2. Does a malpractice claim against a health care provider fall outside the scope of the CPA where the record is devoid of any evidence that the provider's decisions involved entrepreneurial aspects of her profession?

3. Does a private dispute between a health care provider and a patient fall outside the scope of the CPA where the record contains no evidence that the act complained of affects the public interest?

4. Should a cause of action based on the vicarious liability of a principal be dismissed where the plaintiff has settled with the solvent agent?

#### IV. STATEMENT OF THE CASE

##### A. Procedural History

Plaintiff Mystie “Patsy” Michael (“Michael”) alleges negligence, medical battery, and CPA violations against Dr. Betsy Mosquera-Lacy (“Dr. Lacy”), a periodontist, and BNDI in connection with a periodontal bone graft procedure in July 2004. (CP 152-155.)

In January 2006, the trial court dismissed Michael’s CPA claims against both defendants on summary judgment. (CP 130-137.) Michael then settled her negligence and medical battery claims against Dr. Lacy, who is no longer a party. (CP 230-232.) Michael voluntarily dismissed her negligence and medical battery claims against BNDI so that she could immediately appeal the dismissal of her CPA claim. (CP 138-142.)

On August 14, 2007, Division Two of the Washington State Court of Appeals, in a 2-1 decision, reversed the order granting BNDI summary judgment on the CPA claim and remanded the matter to the trial court. BNDI seeks review of the Court of Appeals’ decision.

##### B. Michael Needed a Bone Graft.

On July 27, 2004, Dr. Lacy performed a bone graft procedure on Michael at an Olympia dental clinic.<sup>1</sup> (CP 96.) Dr. Lacy used primarily

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<sup>1</sup> BNDI did not own the clinic, but provided administrative support services to the clinic and its professionals. (CP 24, 124.)

allograft, or human cadaver bone graft material, for the bone graft. (CP 21.) She used a small amount of xenograft, or bovine bone graft material, because Michael's bony deficit was larger than expected and she had insufficient allograft to address the deficit during the procedure. (CP 21.)

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Michael acknowledges that a bone graft was necessary, and makes no allegation that she did not need the bone graft procedure. (CP 32.)

Michael also acknowledges that the procedure was successful, and that the bone graft was completed and healed satisfactorily. (CP 30, 89.)

Michael bases her CPA claim on allegations that she told Dr. Lacy prior to the procedure that she did not want "cow bone" used in her mouth.<sup>2</sup> (CP 28, 35-37.) Michael testified that immediately prior to the procedure, Dr. Lacy said she would use allograft. (CP 28.)

C. Michael's Damages Are for Personal and Emotional Injuries.

The record below is devoid of any mention of injury to business or property. Michael's complaint sought typical personal injury damages, including medical special damages, wage loss, and general damages for pain and suffering. (CP 152-155.) Michael's response to a Request for

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<sup>2</sup> Michael also asserted claims for Dr. Lacy's use of Licodaine as an anesthetic, which Michael alleges caused an allergic reaction, and for post-graft gastrointestinal difficulties related to the use of analgesic medication. Michael did not argue that these issues supported her CPA claim, and these issues were not a basis for the Court of Appeals' decision.

Statement of Damages did not refer to injury to business or property, but repeated the personal injury damages allegations set forth in the complaint. (CP 50.) Similarly, Michael did not testify in her deposition that she was injured in her business or property.

There is no evidence that the xenograft was defective or deficient.

There is no evidence that the xenograft is worth less than the allograft; that it will require repair or replacement; or that it will cause any problem for Michael other than her alleged emotional distress. In fact, Michael does not challenge the quality of the xenograft. (CP 80.)

The only reference in the record to alleged injury resulting from the use of xenograft appears in Michael's answers to interrogatories: "Daily Michael is disgusted of [sic] the thought of having cow bone in her mouth. . . . Because of this incident, Ms. Michael is particularly nervous and hesitant about visiting any dentist and has continuing anxieties derived from having foreign animal matter implanted in her face." (CP 35-37.)

D. BNDI Was Not Responsible for Dr. Lacy's Professional Judgment.

There is no evidence in the record suggesting that BNDI was responsible for Dr. Lacy's supply of bone grafting materials or for Dr. Lacy's exercise of professional judgment. Dr. Lacy was responsible for maintaining all of the materials and supplies that she used, including bone grafting materials, in her own kit. (CP 108, 110.) When she ran low

on bone grafting materials, Dr. Lacy was responsible for making sure more got ordered. (CP 87, 108.) There is no evidence in the record showing that BNDI had any control over the maintenance and ordering of bone grafting materials or Dr. Lacy's professional treatment and care of Michael, including her decision to use xenograft.

E. Michael's Experience Was Unique.

Nothing similar to the incident complained of by Michael has happened before, or since. (CP 124.) There is no evidence in the record suggesting a likelihood of repetition of the type of incident at issue.

**V. ARGUMENT**

A. The Court of Appeals' Decision Conflicts with Prior Washington Case Law and Improperly Broadens the Scope of the CPA.

Pursuant to RAP 13.4(b), the Court should accept review of this case to (1) resolve the conflict between the decision of the Court of Appeals and established case law and (2) to ensure that issues of substantial public interest are properly addressed.

In order to maintain a private right of action under the CPA, a plaintiff must establish (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) that injured the plaintiff in his business or property; and (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The failure to establish even one of these elements

renders all others immaterial, and the CPA claim should be dismissed. *Id.* at 793.

The Court of Appeals erred in its analysis of at least three of the *Hangman Ridge* elements, creating a conflict with prior Washington case law. First, claims for personal injury—such as Michael’s claim for emotional distress over the use of xenograft—are not recoverable under the CPA. Second, professional malpractice claims are not compensable under the CPA. Third, private disputes are not subject to the CPA.

The Court of Appeals’ decision impacts multiple issues of substantial public interest. The CPA is not intended to prohibit acts which are reasonable in relation to the development and preservation of business or which are not injurious to the public. RCW 19.86.920. The Court of Appeals’ holding significantly broadens the scope of the CPA by reducing the minimum requirements for bringing a CPA claim, as set out by the Legislature and this Court. *See* RAP 13.4(b)(4); *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (issue of substantial public interest when opinion affects not only parties to instant proceeding, but other proceedings as well). The Court of Appeals’ decision improperly (1) converts a personal injury claim into a CPA claim whenever purchased property allegedly leads to the personal injury; (2) recognizes a professional malpractice claim as a CPA claim; and (3) changes the

previously established standards by which a dispute is considered to affect the public interest.

Finally, in addition to mistakenly finding genuine issues of material fact as to Michael's CPA claim, the Court of Appeals erred when it did not consider that Michael settled with Dr. Lacy, a solvent agent, thereby extinguishing the only claim against BNDI—her claim for vicarious liability.

Publication by the Court of Appeals reflects its belief that its decision was of public interest or conflicted with prior decisions. *See* RAP 12.3(d) (minimum criteria for publishing Court of Appeals decisions). This Court should also recognize the public import of the Court of Appeals' decision and its conflict with established case law.

B. The Court of Appeals' Decision Improperly Recognizes a Personal Injury Claim as a CPA Claim.

The CPA explicitly requires injury to "business or property." RCW 19.86.090. The phrase "business or property" has restrictive significance. Had the Legislature intended personal injuries to be within the coverage of the CPA, it would have used a less restrictive phrase than "business or property." *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993).

As personal injuries are not covered by the CPA, mental distress, embarrassment, and inconvenience alone do not establish injury to

business or property. *Id.* (holding that pain and suffering are not compensable under the CPA and would only be compensable if a product liability action was cognizable under the facts of the case); *Stephens v. OMNI Ins. Co.*, 138 Wn. App. 151, 180, 159 P.3d 10 (2007). Moreover, allegations of injury to “pseudo-property,” such as medical bills, rehabilitative expenses, and reimbursement for lost wages arising from personal injuries are not injuries to business or property. *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989); *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *rev'd on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999).

Michael’s description of her claimed injuries demonstrates that she claims emotional distress—a classic form of personal injury. Michael’s complaint,<sup>3</sup> discovery responses, deposition testimony, and statement of damages allude only to personal injury type damages. The only reference in the record to injury from the use of xenograft is contained in Michael’s interrogatory answers, in which she states that she is disgusted and anxious because of the use of the xenograft. (CP 37.)

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<sup>3</sup> The Court of Appeals stated Michael sufficiently pled a CPA cause of action under CR 8(a) (Decision p. 5). BNDI does not dispute that Michael adequately pled a CPA claim. BNDI argues that Michael’s complaint and discovery responses demonstrate that the *injuries* for which she seeks to recover are not injuries to business or property.

Despite the lack of evidence of injury to business or property, the Court of Appeals majority improperly concluded that Michael may proceed under the CPA because the use of xenograft instead of allograft deprived her of her use and enjoyment of her property in that she “thought she was purchasing one product and was given another” and “went home with a different product than was represented as being sold to her.” (Decision pp. 7-8.) This conclusion ignores the fact that Michael did not purchase allograft or xenograft. She purchased a bone graft, which was both necessary and successful. This conclusion also overlooks the fact, noted by the minority opinion, that Michael did not present any evidence of deprivation of the use and enjoyment of her property (other than her emotional distress) from Dr. Lacy’s use of xenograft, including evidence that the xenograft is worth less than the allograft; that it will deteriorate faster than the allograft; that it will require repair or replacement that the allograft would not; or that it will cause her to lose the use of her jaw or the bone. (Armstrong, J. (dissenting) pp. 14-15.)

The majority opinion erroneously relies on *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). In *Tallmadge*, a car dealership represented that it was selling a new car to the plaintiff. *Id.* at 92. In fact, the car was used and had a defective transmission which needed repair. *Id.* The court affirmed the trial court’s

award of attorneys' fees<sup>4</sup> under the CPA because the plaintiff was "inconvenienced, deprived of the use and enjoyment of his property, and received an automobile with defects needing repair." *Id.* at 93-94.

Significantly, *Tallmadge* was decided prior to *Hangman Ridge*, where this Court held for the first time that "injury to business or property" is a separate element that a plaintiff must prove under the CPA. *Hangman Ridge*, 105 Wn.2d at 792. Thus, the *Tallmadge* court did not analyze whether the plaintiff had established injury to business or property, but only noted that the plaintiff "suffered injuries for purposes of the Consumer Protection Act." 25 Wn. App. at 93-94. To the extent that *Tallmadge* holds that an alleged substitution of products is actionable under the CPA even in the absence of any injury to business or property, it has been overruled by *Hangman Ridge*.

In addition to the fact that *Tallmadge* is simply not applicable to the facts of this case, the "bait and switch" argument from *Tallmadge*

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<sup>4</sup> Michael, citing *St. Paul Fire and Marine Ins. Co.*, 33 Wn. App. 653, 656 P.2d 1130 (1983), argues that the cost of litigation and attorneys' fees are a compensable injury under the CPA. (CP 78.) These costs do not constitute injury to business or property. *See Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 563-64, 825 P.2d 714 (1992) (holding that, given the *Hangman Ridge* requirement of injury to business or property, *St. Paul's* holding on that issue is too broad). Otherwise, the injury to business or property element would be meaningless, since every plaintiff who litigates will incur these expenses. *See id.*

relied on by the majority opinion did not relate to “injury to business or property” – the element at issue here. Rather, it related to whether there was an unfair or deceptive act, which is a separate element that Michael must prove under the CPA. *See Tallmadge*, 25 Wn. App. at 93 (citation omitted) (“We hold that the act of advertising to the public the sale of a new car, but selling one that has been repaired and repainted, is an unfair and deceptive act”). Disputed evidence of such an unfair and deceptive act does not demonstrate injury to business or property, especially as Michael did not receive a defective product in need of repair.

The flaw in the majority’s approach is demonstrated by the fact that it raises the potential to turn *any* product liability claim under RCW 7.72, *et seq.*, or product performance claim under Washington’s adoption of the Uniform Commercial Code which alleges a defect or deficiency in the product purchased into a CPA claim. For example, in *Stevens*, the softball cleats which plaintiff alleged caused her to fall during a game, causing personal injury, were represented to her as “the best” on the market. 54 Wn. App. at 367. If Stevens had argued that the cleats were not “the best” on the market, and that, in the language of the majority opinion, she “thought she was purchasing one product and was given another” and “went home with a different product than was represented as being sold to her,” would she allege injury to business or property

sufficient to support a CPA claim? Under the rationale of the majority, as stated in its decision, she would have – in contrast to the holding to the contrary in *Stevens*.

Similarly, in *Hiner*, the plaintiff alleged that her tires were faulty, causing her to wreck her car and resulting in personal injury. 91 Wn. App. at 726. The court dismissed *Hiner*'s CPA claim, rejecting her argument that she had suffered injury to her career and to her vehicle, noting that these are not the type of injuries to business or property contemplated by the CPA. *Id.* at 730. The result should not be different if *Hiner* had argued that “thought she was purchasing one product and was given another” and “went home with a different product than was represented as being sold to her” because the tires were faulty.

Plaintiffs in both *Stevens* and *Hiner* failed to establish injury to property necessary to support a CPA claim, even though they alleged that the products involved in their claims were deficient or defective. The result for Michael should not be different – especially as she acknowledges that the xenograft is *not* defective. (CP 80.)

As Judge Armstrong argued in his dissent, Michael failed to show an injury to business or property. Because Michael has not suffered injury to business or property, the Court of Appeals erred when it found that Michael has established injury as required by the CPA.

C. The Court of Appeals' Decision Improperly Recognizes a Professional Malpractice Claim as a CPA Claim.

Michael's claim, if any, is for health care malpractice under RCW 7.70, *et seq.* RCW 7.70.020 provides that a dentist is a "health care provider." Dr. Lacy's choice to use xenograft when she ran out of allograft was a matter of professional judgment and competence. The Court of Appeals erred when it determined that a material issue of fact exists as to whether the use of xenograft, and Dr. Lacy's alleged representations to Michael, involved "entrepreneurial aspects" of her profession. (Decision pp. 10-11.)

Claims for professional negligence are exempt from the CPA because they do not fall within the sphere of trade or commerce. *Short v. Demopolis*, 103 Wn.2d 52, 66, 691 P.2d 163 (1984). "With regard to the 'learned professions', such as law or medicine, the question is whether the claim involves entrepreneurial aspects of the practice; mere claims of professional negligence or malpractice are exempt." *Jaramillo v. Morris*, 50 Wn. App. 822, 827, 750 P.2d 1301 (1988), *rev. denied*, 110 Wn.2d 1040, 750 P.2d 1301 (1988) (citations omitted).

There is no evidence in the record that Dr. Lacy's use of xenograft involved an entrepreneurial aspect of her profession. Entrepreneurial activities do not involve "the process in which [a physician is] utilizing the skills which he [or she] had been taught in examining, diagnosing,

treating, or caring for the plaintiff as his [or her] patient.” *Wright v. Jeckle*, 104 Wn. App. 478, 484-85, 16 P.3d 1268 (2001) (quoting *Branom v. State*, 94 Wn. App. 964, 974 P.2d 335 (1999)).

The facts of this case are similar to those in *Benoy v. Simons*, 66 Wn. App. 56, 831 P.2d 167 (1992), *rev. denied*, 120 Wn.2d 1014, 844 P.2d 435 (1992). There, the plaintiffs brought a CPA claim against the doctor who cared for their infant grandson, alleging that he led them to believe that the care given to the child was required when it actually had no beneficial value. *Id.* at 65. The court dismissed the plaintiffs’ CPA claim, holding that there was “no showing” that the doctor’s decision to maintain the child on a ventilator “was influenced by any entrepreneurial motives on his part.” *Id.*

Here, as in *Benoy*, Michael has not shown that Dr. Lacy’s decision was influenced by entrepreneurial motives. The record is completely silent regarding advertising, marketing, or other entrepreneurial activities of Dr. Lacy and BNDI. There is no evidence, for example, that Dr. Lacy substituted xenograft for allograft because it would increase profits or the volume of patients. *Compare Quimby v. Fine*, 45 Wn. App. 175, 181, 724 P.2d 403 (1986) (entrepreneurial activities include promoting procedures

if the purpose is to increase profits and the volume of patients).<sup>5</sup> The evidence is undisputed that Dr. Lacy used a small amount of xenograft during a necessary and successful procedure because she ran out of allograft and would not have been able to complete the procedure otherwise. Her decision to do so is a matter of professional judgment pertaining to the treatment and care of Michael.

The Court of Appeals erroneously relied on *Wright*. (Decision p. 10.) *Wright* involved a review of a dismissal under CR 12(b)(6). The court did not consider whether the plaintiff presented evidence of entrepreneurial activities, as it was bound to accept the plaintiff's allegations as true and thus had to assume that the health care provider engaged in entrepreneurial activities. 104 Wn. App. at 482. *Wright*

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<sup>5</sup> Michael's reliance on *Quimby* is misplaced. (CP 71, 74.) *Quimby* alleged her doctor substituted one tubal ligation sterilization procedure, which was unsuccessful, in lieu of another. 49 Wn. App. at 176-77. The court held that the plaintiffs' medical negligence claim was not actionable under the CPA, but that their lack of informed consent claim could be within the scope of the CPA if the doctor's dishonest and unfair practices were used to promote entrepreneurial aspects. *Id.* at 181. *Quimby* is distinguishable in two regards. First, Michael does not allege lack of informed consent, RCW 7.70.050, and, in any event, can not meet the requirements of the statute. Second, the court in *Quimby* concluded that discovery would show that consent to the tubal ligation related to an entrepreneurial aspect of the doctor's profession. Here, the parties conducted significant discovery, including depositions of Michael, Dr. Lacy, and others, and there is no evidence relating Dr. Lacy's use of xenograft to entrepreneurial activities.

merely affirms that a plaintiff may bring an independent action against a doctor alleging that entrepreneurial activities violate the CPA. *Id.* at 485.

There is no evidence in this case relating Dr. Lacy's use of xenograft to entrepreneurial activities. The Court of Appeals' decision substantially changes prior law by holding that health care malpractice is compensable under the CPA. Under the majority's rationale, whenever a health care professional has to exercise his or her judgment as to the type of materials to use in the treatment of a patient, a CPA claim can arise even though the procedure was necessary and successful. The Court of Appeals erred in holding that an issue of fact exists as to whether the use of xenograft related to entrepreneurial aspects of Dr. Lacy's profession.<sup>6</sup>

D. The Court of Appeals' Ruling Improperly Allows a Private Dispute to Be the Basis for a CPA Claim.

“[T]he obvious purpose of the CPA is to protect the public from acts or practices which are injurious to consumers and not to provide an additional remedy for private wrongs which do not affect the public

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<sup>6</sup> The Court of Appeals erroneously stated that BNDI did not meet its “burden” of showing that, as a matter of law, use of the xenograft and Dr. Lacy's alleged representations are not entrepreneurial activities. (Decision pp. 10-11.) BNDI only needs to show the absence of evidence to support the “trade or commerce” element of Michael's CPA claim—it is then Michael's burden to establish that such evidence exists. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

generally.” *Lightfoot v. MacDonald*, 86 Wn.2d 331, 333, 544 P.2d 88 (1976). Although this case involves a private dispute, the Court of Appeals, without analysis, held that an issue of fact exists as to whether the dispute between the parties affects the public interest. (Decision pp. 11-12.)

In *Hangman Ridge*, this Court set forth multiple factors to determine whether the public has an interest in any given action. 105 Wn.2d at 789. In an essentially private transaction such as the case at bar,<sup>7</sup> the relevant factors are:

- (1) Were the alleged acts committed in the course of defendant’s business?
- (2) Did defendant advertise to the public in general?
- (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others?
- (4) Did plaintiff and defendant occupy unequal bargaining positions?

*Id.* at 794. The record contains no evidence of advertising by either Dr. Lacy or BNDI. *See id.* There is no evidence that BNDI actively solicited Michael, or, for that matter, anyone. *See id.* Michael’s decision to undergo the complained of bone graft procedure was brought about through private conversations between herself and Dr. Lacy. Additionally, there is no evidence in the record of the parties’ bargaining positions. The

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<sup>7</sup> Private disputes include attorney-client, insurer-insured, realtor-purchaser, and escrow agent-client. *Hangman Ridge*, 105 Wn.2d at 790.

Court of Appeals erred when it held that a genuine issue of material fact exists as to whether the subject dispute affects the public interest.<sup>8</sup>

E. The Court of Appeals Erred When It Did Not Consider That Plaintiff Settled With Dr. Lacy, a Solvent Agent.

Michael's sole basis for her CPA claim is Dr. Lacy's use of the xenograft. She does not allege, nor is there any evidence to support such an allegation, that BNDI breached an independent duty to provide proper treatment to Michael. (CP 152-155.) The evidence is undisputed that, as the Court of Appeals stated (Decision p. 2.), Dr. Lacy, not BNDI, was responsible for ordering and maintaining the bone graft materials and performing the bone graft procedure.<sup>9</sup> (CP 87, 108, 110.)

Under RCW 4.22.040, a principal is discharged from liability when a solvent agent and injured party have settled. *Perkins v. Children's Orthopedic Hosp.*, 72 Wn. App. 149, 159, 864 P.2d 398 (1994). "[T]he very foundation of a principal's secondary liability would be undermined

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<sup>8</sup> Michael cannot establish an impact on the public interest as a consumer transaction either. The factors to be considered in consumer transactions deal with patterns of conduct and repetition prior to and after the complained of act. *Hangman Ridge*, 105 Wn.2d at 790. Michael offers no evidence that her experience was part of a generalized course of conduct, or that similar acts were performed prior to or after her surgery.

<sup>9</sup> On appeal, Michael argued for the first time that BNDI was independently liable, but there is no evidence supporting a duty owed by BNDI to inventory bone grafting product or to have a protocol for ordering such products, or that it breached any such duty.

if a primarily liable agent, capable of making the plaintiff whole, were released and the principal pursued for any remaining damages.” *Id.* at 159-60. Michael’s claim against BNDI is for vicarious liability, and Michael’s settlement with Dr. Lacy extinguished any potential liability for BNDI.

This issue was not, and could not have been, raised at the trial court level. After the trial court granted Dr. Lacy and BNDI summary judgment as to the CPA claims, Michael (1) settled her negligence and medical battery claims against Dr. Lacy and (2) dismissed those same two claims against BNDI so she could appeal the order granting BNDI summary judgment. (CP 138-142, 230-232.)

Nonetheless, this Court and the Court of Appeals have the discretion to consider plaintiff’s settlement with Dr. Lacy because such consideration is necessary to reach a proper decision. *See Shoreline Comm. College Dist. No. 7 v. Employment Sec. Dep’t*, 120 Wn.2d 394, 402, 842 P.2d 938 (1993) (citation omitted). The Court of Appeals should have affirmed the trial court on this ground even though it found a genuine issue of material fact as to the existence of a CPA claim. RAP 2.5(a) (an appellate court may consider a ground for affirming a trial court decision not presented in the trial court). The failure of the Court of Appeals to consider this dispositive issue has resulted in this Petition for Review.

The failure of this Court to consider this dispositive issue will result in a waste of the court's and the parties' time and resources on remand.

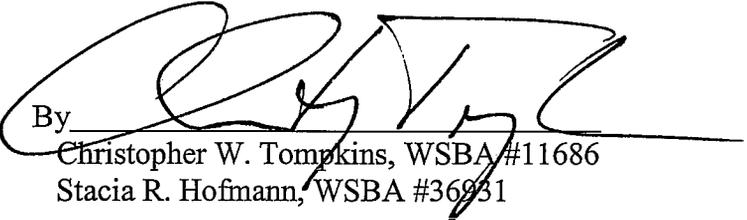
## VI. CONCLUSION

Bright Now! Dental, Inc. needs only to show the absence of an issue of fact regarding any one element of the CPA. The Court of Appeals erred when it held that Michael presented (1) evidence of injury to business or property; (2) evidence that Dr. Lacy's decisions were influenced by entrepreneurial aspects; and (3) evidence that the private dispute between the parties affects the public interest. Moreover, the Court of Appeals should have dismissed BNDI because Michael settled with Dr. Lacy, extinguishing any vicarious liability.

The Court of Appeals' holding conflicts with Washington case law, and presents issues of substantial public interest. If the Court of Appeals' decision is not overturned, personal injury and professional malpractice claims, previously excluded from the CPA by the Legislature and this Court, will be subject to the CPA. Moreover, private disputes which are not injurious to the public will also be subject to the CPA, despite the Legislature's express intent to the contrary. This Court should grant review of and reverse the Court of Appeals' decision, affirming the trial court's dismissal of Michael's Consumer Protection Act claim.

Respectfully submitted this 13th day of September, 2007.

BETTS, PATTERSON & MINES, P.S.

By   
Christopher W. Tompkins, WSBA #11686  
Stacia R. Hofmann, WSBA #36931

Attorneys for Petitioner Bright Now!  
Dental, Inc.

SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO.: 34497-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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MYSTIE "PATSY" MICHAEL,  
Appellant,

vs.

BRIGHT NOW! DENTAL, INC., a Washington Corporation,  
Respondent.

---

**APPENDIX TO PETITION FOR REVIEW**

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**COURT OF APPEALS  
OPINION**

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MYSTIE MICHAEL,

Appellant,

v.

BETSY MOSQUERA-LACY, ET AL.,

Respondents.

No. 34497-1-II

PUBLISHED OPINION

PENoyer, J. — Mystie Michael appeals the trial court's grant of summary judgment, dismissing her Consumer Protection Act (CPA)<sup>1</sup> claims against Bright Now! Dental (Bright Now) for her periodontist, Dr. Betsy Mosquera-Lacy, using cow bone for grafting after Michael specifically requested that no animal products be used. There are material issues of fact as to whether an unfair or deceptive act or practice existed, whether the complained-of actions were "entrepreneurial aspects" of the profession that occur in trade or commerce, and whether the complained-of actions impact public interests. We therefore reverse and remand for trial.

<sup>1</sup> Consumer Protection Act Chapter of 1961 Wash. Rev. Code § 19.86 (2006).

FACTS

Bright Now provides dental care and periodontal services to the general public. Michael visited Bright Now for dental care and a bone grafting procedure. She filled out a pre-procedure form, stating that she was allergic to the anesthetic Lidocaine. Michael's primary care physician informed Bright Now that Michael reacts to Lidocaine with seizures and instructed Bright Now to test her for alternative medications before surgery.

Dr. Lacy met with Michael and discussed the different products she could use for Michael's bone grafting procedure. Dr. Lacy explained that xenograft (cow bone), allograft (human bone), or synthetic bone could be used. Dr. Lacy stated that she provided Michael with the information on different bone material because "I wanted her to know the different options that [we] have." 1 Clerk's Papers (CP) at 62. Katie Guthrie, Bright Now's customer service representative, testified that Michael specifically requested that no cow bone be used in her grafting procedure. Guthrie told Dr. Lacy that Michael did not want Dr. Lacy to use cow bone and told Dr. Lacy that she needed to discuss the matter with Michael. Dr. Lacy told Guthrie that she most commonly uses cow bone in a bone grafting procedure but that it was possible to use a different type of bone. Dr. Lacy was responsible for maintaining the materials and supplies she would need for bone grafting procedures at Bright Now.

A few months later, Dr. Lacy performed Michael's grafting procedure. She gave Michael seven Lidocaine capulets as an anesthetic. As Michael lay in the dentist's chair before the procedure, she asked Dr. Lacy, "Can I see the bone?" 1 CP at 28. Dr. Lacy replied, "Yes," and showed the bone material to Michael. 1 CP at 28. Michael said, "And this is human bone?" 1 CP at 28. Dr. Lacy responded, "No, it's cow bone." 1 CP at 28. Michael said, "Dr. Lacy, I said

I didn't want cow bone...I just can't fathom the thought of animal parts being in my body.... Do you have human bone?" 1 CP at 28. Dr. Lacy responded that she did; "I have some in the back. I'll go get it." 1 CP at 28. Michael again said, "I just don't want any cow bone in me." 1 CP at 28. Dr. Lacy indicated to Michael that she understood; she left and then returned and performed the procedure.

After the procedure, Michael began vomiting, lost consciousness, and was rushed out of Bright Now to the emergency room. At the hospital, she was treated for medical conditions resulting from the Lidocaine. Michael returned home from the hospital and Dr. Lacy phoned her multiple times to check on her recovery. During one of these phone calls, Dr. Lacy informed Michael that she had used cow bone during the bone grafting procedure because she did not have enough human bone material to finish Michael's procedure.

Michael sued Dr. Lacy and Bright Now for negligence, medical battery, and CPA violations. Dr. Lacy and Bright Now moved for partial summary judgment, arguing that Michael's CPA claims should be dismissed. The trial court granted summary judgment and Michael voluntarily dismissed her other claims against Dr. Lacy and Bright Now. Michael now appeals the trial court's order granting summary judgment.

#### ANALYSIS

On review of an order for summary judgment, we perform the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The standard of review is de novo and summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). In reviewing a

summary judgment motion, we view all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The moving party, here Bright Now, bears the burden of demonstrating that there is no genuine issue of material fact as to any of the CPA claim elements. *Atherton*, 115 Wn.2d at 516.

There are five elements of a CPA claim: (1) an unfair or deceptive act or practice that; (2) occurs in trade or commerce; (3) impacts the public interest; (4) causes injury to the plaintiff in her business or property; and (5) the injury is causally linked to the unfair or deceptive act. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 312, 858 P.2d 1054 (1993). Bright Now had the burden of proving to the trial court that there was no genuine issue of material fact as to any of these elements and that Bright Now was entitled to judgment as a matter of law.

#### I. SUFFICIENCY OF PLEADINGS

A threshold question is whether Michael sufficiently pled a CPA claim. The dissent points out that Michael's claim does not specifically allege any injury to "property" as required by the CPA. Dissent at 14; 1 CP at 46. The dissent analyzes *Tallmadge* to find that Michael must allege damage to property in her complaint. Dissent at 14-15 (citing *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 93-94, 605 P.2d 1275 (1979)).

In *Tallmadge*, the court applied the CPA where the plaintiff had been "inconvenienced, deprived of the use and enjoyment of his property, and received an automobile with defects needing repair." *Tallmadge*, 25 Wn. App. at 94. The dissent distinguishes Michael's claim from

the plaintiff in *Tallmadge* based on the elements of compensable damages pled. However, it is not clear from *Tallmadge* what, if any, compensable damages were claimed in the plaintiff's pleadings. See *Tallmadge*, 25 Wn. App. at 93-95. The court found that "the *record* indicate[d] that [the plaintiff] suffered injuries for purposes of the Consumer Protection Act. . ." *Tallmadge*, 25 Wn. App. at 93-94 (emphasis added). The court addressed the evidence in the record that supported the court's finding of damages. *Tallmadge*, 25 Wn. App. at 92-94. It did not address the damages pled. *Id.* Thus *Tallmadge* is not helpful for the purpose of determining the sufficiency of pleadings in this case.

We analyze Michael's pleading sufficiency based on applicable court rules and case law. While *inexpert* pleadings may survive a summary judgment motion, insufficient pleadings cannot. *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986). Washington is a *notice* pleading state and merely requires a simple, concise statement of the claim and the relief sought. CR 8(a). Complaints failing to give the *opposing party fair notice* of the claim asserted are insufficient. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999) (a party who fails to plead a cause of action "cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along"); *Lundberg v. Coleman*, 115 Wn. App. 172, 180, 60 P.3d 595 (2002).

Michael specifically pled a CPA claim. Under the heading "CAUSES OF ACTION", the complaint states "CONSUMER PROTECTION ACT: Defendants engaged in deceptive practices causing injury to Ms. Michael in [sic] manner prohibited under Washington law." 1 CP at 46. The term "deceptive practices" is statutory language under the CPA. RCW 19.86.020. Within her complaint, Michael pled damages for ". . . conscious pain, suffering and mental

anguish, as well as physical disability and permanent injuries. . .damages for loss of enjoyment of life, emotional distress, anguish, mental and emotional shock and other special and general damages presently unknown.” 1 CP at 46. She also pled damages for “. . .pecuniary losses and other general and special damages that will be proven at the time of trial.” 1 CP at 46.

Because Washington is a notice pleading state, Michael must give fair notice of the claim asserted. CR 8(a). At trial Michael will have to prove damage to her property that resulted from Bright Now’s deceptive acts or practices. *See Nelson v. Nat’l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 393, 842 P.2d 473 (1992) (Element of CPA violation is injury to plaintiff’s business or property). However, there is no requirement that she completely detail the damages that she suffered within the complaint. Michael alleged both a CPA violation and damages based on that violation. She gave Bright Now fair notice of her claim’s basis. We find her complaint sufficient.

## II. INJURY TO BUSINESS OR PROPERTY

Michael argues that sufficient evidence exists to support a claim that she suffered an injury to business or property under the CPA. Relying on *Tallmadge*, she asserts that the cow bone inserted into her jaw was defective and therefore subject to the CPA because it involved a “substitution of products.” Br. of Appellant at 20. She asserts that she requested human bone and instead she was given cow bone and she therefore suffered an injury to property.

Bright Now counters that Michael suffered no injury to property or business and the CPA does not apply to claims arising out of alleged malpractice by a health care provider. Bright Now asserts that Michael’s injuries are classic personal injury claims and not subject to the CPA.

Personal injury claims are not subject to the CPA. *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 369, 773 P.2d 871 (1989). The CPA only covers injury to “business or property.” *Stevens*, 54 Wn. App. at 369. If the Legislature had intended to include personal injury actions within the CPA, it would have used a less restrictive phrase than “business or property.” *Stevens*, 54 Wn. App. at 369.

In *Tallmadge*, the case Michael relied on, we held that there was a valid CPA claim when a plaintiff bought a car at a dealership in response to their advertisement. The advertisement stated that the car was a new car and the plaintiff later discovered that the car had been damaged and repainted. *Tallmadge*, 25 Wn. App. at 93. The plaintiff sued the car dealership under the CPA and we held that the act of advertising to the public the sale of a new car, but selling a used car, was an unfair and deceptive act. *Tallmadge*, 25 Wn. App. at 93. We explained that the plaintiff suffered injuries subject to the CPA because he was inconvenienced, deprived the use and enjoyment of his property, and received an automobile that needed to be repaired. *Tallmadge*, 25 Wn. App. at 93.

However, in *Stevens*, Division Three held that there was no injury under the CPA when a plaintiff bought a pair of softball shoes from a salesperson after the salesperson claimed that the shoes were the best shoe on the market. During a softball game, the plaintiff was wearing the shoes and the outer cleat caught in the dirt, severely fracturing her leg. *Stevens*, 54 Wn. App. at 367. The court held that the plaintiff’s injuries were merely personal injuries and not subject to the CPA. *Stevens*, 54 Wn. App. at 369.

We hold that Michael’s injury of having cow bone used during the procedure, after she specifically requested that it not be used, like in *Tallmadge* is the type of injury that, if proven, is

subject to the CPA. Michael provided sufficient evidence that she suffered injury to property and thus summary judgment on this issue was not proper.

Michael specifically requested that human bone be used during her bone grafting procedure and Dr. Lacy instead used cow bone. Similar to *Tallmadge*, Michael went home with a different product than was represented as being sold to her. The current location of the property, in Michael's jaw, does not change the result because she was given a product that she had rejected. If her only injury was gum swelling or complications from the bone grafting surgery, then the CPA would not apply. Here, as in *Tallmadge*, Michael thought she was purchasing one product but was given another. Additionally, Michael's CPA injury does not have to be great, or even quantifiable. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 563-64, 825 P.2d 714 (1992). "When a misrepresentation causes inconvenience that deprives the claimant of the use and enjoyment of his property, the injury element [of the CPA] is satisfied." *Stephens v. Omni Ins. Co.*, \_\_\_ Wn. App. \_\_\_, 159 P.3d 10, 25 (2007). Because the scope of injury to property under the CPA "is especially broad and is not restricted to commercial or business injury[,]" Michael may recover damages under the CPA by showing that the cow bone graft has deprived her of use and enjoyment of her property. *Stephens*, \_\_\_ Wn. App. \_\_\_, 159 P.3d at 25. We hold that the trial court erred in granting summary judgment.

### III. UNFAIR OR DECEPTIVE ACT

Bright Now argues that Michael failed to provide any evidence regarding advertising or promotional activities and that the second element of a CPA claim therefore cannot be met. We disagree. Under the CPA, there must be an unfair or deceptive act or practice. It is not necessary to prove intent to deceive or defraud. *Fisher v. World-Wide Trophy Outfitters*, 15 Wn. App. 742,

748, 551 P.2d 1398 (1976). Here, Michael was assured by Bright Now's customer service representative that no cow bone would be used. Later, during the procedure, Michael told Dr. Lacy that she did not want cow bone used. Bright Now cites to no case stating that advertising is necessary to satisfy this element of a CPA claim. Because there is sufficient evidence to establish a material question of fact as to whether an unfair or deceptive act or practice existed, summary judgment was not proper.

#### IV. TRADE OR COMMERCE

The second element of the CPA is satisfied of the deceptive act occurred in "trade or commerce." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d at 312. Michael contends that Dr. Lacy and Bright Now solicited and retained her business by representing that human bone material was available for the bone grafting procedure. She argues that her injury relates to the "entrepreneurial aspects" of their practice and the procedure and is therefore subject to the CPA. Bright Now disagrees.

Historically, the "learned professions," such as law or medicine, were not considered within the sphere of "trade or commerce" and not subject to the CPA. *Quimby v. Fine*, 45 Wn. App. 175, 180, 724 P.2d 403 (1986). In *Short* our Supreme Court held that the "entrepreneurial aspects" of a legal practice are within the sphere of trade or commerce and are subject to the CPA. *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984); *Quimby*, 45 Wn. App. at 180. The court explained that "entrepreneurial aspects" of a practice include how the price of services is determined, billed, and collected and the manner in which a firm obtains, retains, and dismisses clients. *Quimby*, 45 Wn. App. at 180 (citing *Short*, 103 Wn.2d at 61). However, CPA claims that relate to the competence and performance of a profession do not fall within the

sphere of trade or commerce and are thus not subject to the CPA. *Jaramillo v. Morris*, 50 Wn. App. 822, 750 P.2d 1301 (1988). “Entrepreneurial activities” do not include the processes in which a physician uses her learned skills in examining, diagnosing, treating, or caring for a patient. *Wright v. Jeckle*, 104 Wn. App. 478, 484-85, 16 P.3d 1268 (2001). The inquiry here is to determine if Dr. Lacy’s material choice for Michael’s procedure is an entrepreneurial activity.

In *Jaramillo*, a plaintiff suffered injuries when her podiatrist performed an ankle surgery that fell below acceptable medical standards. *Jaramillo*, 50 Wn. App. at 824. The court held that the negligence claims against the doctor were not properly cognizable under the CPA because they only related to his medical negligence and not to any “entrepreneurial aspects.” *Jaramillo*, 50 Wn. App. at 826. Similarly in *Quimby*, a plaintiff asserted that her doctor violated the CPA when he substituted one sterilization procedure for another without her consent. *Quimby*, 45 Wn. App. at 176-77. The court held that the ineffective sterilization procedure medical negligence claim was not subject to the CPA because it only related to the doctor’s negligence and not to any “entrepreneurial aspects” of the profession.<sup>2</sup> *Quimby*, 45 Wn. App. at 179. But in *Wright*, a physician’s advertising, sale, and marketing of diet drugs was subject to the CPA because it implicated the “entrepreneurial aspects” of his medical practice. *Wright*, 104 Wn. App. at 482-83.

A material issue of fact exists on whether the use of cow bone and Dr. Lacy’s representations that cow bone would not be used were “entrepreneurial aspects” of her profession. Here Bright Now has not met its burden of showing that, as a matter of law, Dr.

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<sup>2</sup> The court held that her lack of informed consent was subject to the CPA. *Quimby*, 45 Wn. App. at 181.

Lacy's representations and use of cow bone were not "entrepreneurial activities." We therefore hold that summary judgment was not proper on this issue. It is possible that a jury could determine that Dr. Lacy's representations and use of the cow bone related to the manner in which Bright Now obtains, retains, and dismisses clients and is therefore an entrepreneurial aspect of her practice. However, there is insufficient evidence here for us to make that determination as a matter of law. The parties dispute whether Dr. Lacy's use of cow bone relates to her competence and performance as a dentist and exempt from the CPA or if it was an "entrepreneurial aspect" of her profession. We remand for a jury to make this determination.

V. IMPACTS PUBLIC INTEREST

Michael asserts that the trial court erred in granting summary judgment because a trier of fact determines whether the public has an interest in any given action. Bright Now disagrees, arguing that there was no issue of material fact regarding public interest.

The CPA's purpose is to protect the public and foster fair and honest competition. RCW 19.86.920. It is, however, the legislature's intent that the CPA shall not be construed to prohibit acts or practices that do not injure the public interest. RCW 19.86.920. The CPA's purpose is to protect the public, not to provide an additional remedy for private wrongs. *Lightfoot v. MacDonald*, 86 Wn.2d 331, 333, 544 P.2d 88 (1976).

The trier of fact determines whether the public has an interest in any given action from several factors, and which factors the fact finder considers depends on whether the transaction was essentially a "consumer" transaction or a "private" transaction. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789-90, 719 P.2d 531 (1986). If the transaction was essentially a consumer transaction, the trier of fact should consider whether (1)

the alleged acts were committed in the course of defendant's business; (2) the acts were a part of a pattern or generalized course of conduct; (3) repeated acts were committed before the act involving the plaintiff; (4) there is a real and substantial potential for repetition of defendant's conduct; and (5) the act complained of involved a single transaction, or many consumers.

*Hangman*, 105 Wn.2d at 790.

If the transaction was essentially a "private" dispute, our Supreme Court noted that it might be more difficult to establish that the public has an interest because, ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. *Hangman*, 105 Wn.2d at 790. However, if it is likely that additional plaintiffs have been or will be injured in exactly the same fashion as the private plaintiff, a private dispute enters the realm of the public interest. *Hangman*, 105 Wn.2d at 790.

If a transaction is essentially a private dispute, the trier of fact should consider whether (1) the alleged acts were committed in the course of defendant's business; (2) the defendant advertised to the public in general; (3) the defendant actively solicited the particular plaintiff; and (4) the plaintiff and defendant occupy unequal bargaining positions. *Hangman*, 105 Wn.2d at 791. The likelihood that additional plaintiffs have been or will be injured in exactly the same fashion changes a factual pattern from a private dispute into one that affects the public interest. *Hangman*, 105 Wn.2d at 790 (citing *McRae v. Bolstad*, 101 Wn.2d 161, 676 P.2d 496 (1984)); *Edmonds v. John L. Scott Real Estate*, 87 Wn. App. 834, 847, 942 P.2d 1072 (1997).

None of the above factors is dispositive and not all factors need to exist in order for a transaction to demonstrate public interest. *Hangman*, 105 Wn.2d at 791. The factors in both the "consumer" and "private dispute" contexts merely represent the indicia of an effect on public

interest from which a trier of fact could reasonably find an impact on the public interest.

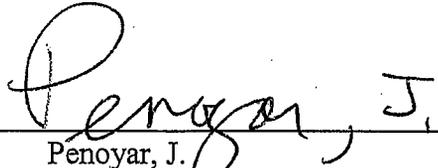
*Hangman*, 105 Wn.2d at 791. They need not all exist to demonstrate public interest. *Id.*

Here, Bright Now, as the moving party, needed to establish that no genuine issue of material fact existed in regard to public interest. *Atherton*, 115 Wn.2d at 516. It needed to demonstrate that the only reasonable conclusion from the evidence was that the transaction involved did not affect the public interest. *Vallandigham*, 154 Wn.2d at 26. It failed to do so. Considering all facts in the light most favorable to the nonmoving party, we hold that summary judgment was not proper because there is an issue of material fact regarding public interest. *Vallandigham*, 154 Wn.2d at 26.

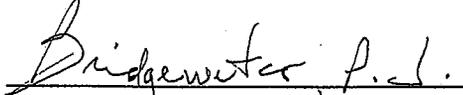
VI. CAUSAL LINK BETWEEN INJURY AND DECEPTIVE ACT

Finally, neither party argues that the fifth element of a CPA claim is not met here. Neither asserts that there is no casual link between the injury and deceptive act.

Because Bright Now has not met its burden to establish that there are no genuine issues of material fact as to any of the five elements of a CPA claim, we reverse the trial court's entry of summary judgment. *Wash. State Physicians Ins. Exch. & Ass'n*, 122 Wn.2d at 312. We reverse and remand for a trial to resolve these factual issues.

  
\_\_\_\_\_  
Penoyar, J.

I concur:

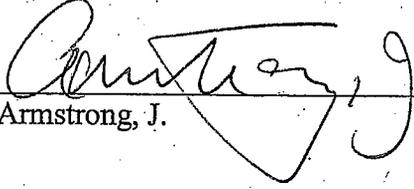
  
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Bridgewater, P.J.

ARMSTRONG, J. (Dissenting) -- Because the Consumer Protection Act applies only to business or property loss claims and the Plaintiff claims only personal injury damages, the trial court did not err in granting the defendants summary judgment. Accordingly, I dissent.

In her complaint, Michael alleged that she suffered “conscious pain, suffering and mental anguish, as well as physical disability and permanent injuries.” CP at 154. She also claimed “damages for loss of enjoyment of life, emotional distress, anguish, mental and emotional shock and other special and general damages presently unknown.” CP at 155. Michael did not claim property damage. Specifically, Michael’s complaint did not allege that the cow bone was worth less than human bone, that it would deteriorate faster than human bone, that it would require repairs that human bone would not, or that it would cause her to lose the use of her jaw or the bone. Moreover, in her response to the defendants’ motions for summary judgment, Michael again did not claim any property or business losses.

Yet the majority reasons that Michael’s claim is similar to the plaintiff’s claim in *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). The majority finds such similarity because here, as in *Tallmadge*, Michael did not receive what she bargained for. *See Tallmadge*, 25 Wn. App. at 94. The majority does not discuss the differences between the two cases, which center on the damages claimed. In *Tallmadge*, the plaintiff purchased a car from the defendant that the defendant had advertised as new. *Tallmadge*, 25 Wn. App. at 93. In fact, the car had been damaged and repaired, which the defendant did not disclose to the plaintiff. *Tallmadge*, 25 Wn. App. at 93. In upholding a Consumer Protection Act violation, the court described the purchaser’s damages as being inconvenienced, deprived of the use and enjoyment of the vehicle, and receiving an automobile with defects. *Tallmadge*, 25

Wn. App. at 93-94. Michael makes no such claims. Because the Consumer Protection Act does not cover medical malpractice claims or personal injury claims of any sort, the defendants were entitled to summary judgment. *See Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989) (personal injury claims are not subject to the Consumer Protection Act); *Quimby v. Fine*, 45 Wn. App. 175, 180, 724 P.2d 403 (1986) (professional negligence claims, such as medical malpractice, are not subject to the Consumer Protection Act).

  
Armstrong, J.

WASHINGTON STATE  
STATUTES



West's RCWA 19.86.020

**C**

WEST'S REVISED CODE OF WASHINGTON ANNOTATED  
TITLE 19. BUSINESS REGULATIONS--MISCELLANEOUS  
CHAPTER 19.86. UNFAIR BUSINESS PRACTICES--CONSUMER PROTECTION  
→19.86.020. **Unfair competition, practices, declared unlawful**

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Current with 2007 legislation effective through August 30, 2007, except that the statutes do not contain certain new or renumbered provisions that have not yet been assigned a permanent classification by the Code Reviser

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Page 1

West's RCWA 19.86.920

**C**

WEST'S REVISED CODE OF WASHINGTON ANNOTATED  
TITLE 19. BUSINESS REGULATIONS--MISCELLANEOUS  
CHAPTER 19.86. UNFAIR BUSINESS PRACTICES--CONSUMER PROTECTION

→ 19.86.920. Purpose--Interpretation--Liberal construction--Saving--1985 c 401; 1983 c 288; 1983 c 3;  
1961 c 216

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

Current with 2007 legislation effective through August 30, 2007, except that the statutes do not contain certain new or renumbered provisions that have not yet been assigned a permanent classification by the Code Reviser

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West's RCWA 19.86.090



**This document has been updated. Use KEYCITE.**

WEST'S REVISED CODE OF WASHINGTON ANNOTATED  
TITLE 19. BUSINESS REGULATIONS--MISCELLANEOUS  
CHAPTER 19.86. UNFAIR BUSINESS PRACTICES--CONSUMER PROTECTION  
→19.86.090. Civil action for damages--Treble damages authorized--Action by governmental entities

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed the amount specified in RCW 3.66.020. For the purpose of this section "person" shall include the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in the superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

Current with 2007 legislation effective through August 30, 2007, except that the statutes do not contain certain new or renumbered provisions that have not yet been assigned a permanent classification by the Code Reviser

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West's RCWA 7.70.020



WEST'S REVISED CODE OF WASHINGTON ANNOTATED  
TITLE 7. SPECIAL PROCEEDINGS AND ACTIONS  
CHAPTER 7.70. ACTIONS FOR INJURIES RESULTING FROM HEALTH CARE  
→ 7.70.020. Definitions

As used in this chapter "health care provider" means either:

- (1) A person licensed by this state to provide health care or related services, including, but not limited to, a licensed acupuncturist, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, midwife, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his or her estate or personal representative;
- (2) An employee or agent of a person described in part (1) above, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or
- (3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in part (1) above, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative.

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West's RCWA 4.22.040

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WEST'S REVISED CODE OF WASHINGTON ANNOTATED  
TITLE 4. CIVIL PROCEDURE  
CHAPTER 4.22. CONTRIBUTORY FAULT--EFFECT--IMPUTATION--CONTRIBUTION-- SETTLEMENT  
AGREEMENTS

**→4.22.040. Right of contribution--Indemnity**

(1) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution among liable persons is the comparative fault of each such person. However, the court may determine that two or more persons are to be treated as a single person for purposes of contribution.

(2) Contribution is available to a person who enters into a settlement with a claimant only (a) if the liability of the person against whom contribution is sought has been extinguished by the settlement and (b) to the extent that the amount paid in settlement was reasonable at the time of the settlement.

(3) The common law right of indemnity between active and passive tort feasons is abolished: PROVIDED, That the common law right of indemnity between active and passive tort feasons is not abolished in those cases to which a right of contribution by virtue of RCW 4.22.920(2) does not apply.

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SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO.: 34497-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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MYSTIE "PATSY" MICHAEL,  
Appellant,

vs.

BRIGHT NOW! DENTAL, INC., a Washington Corporation,  
Respondent.

---

**CERTIFICATE OF SERVICE**

---

Christopher W. Tompkins, WSBA # 11686  
Stacia R. Hofmann, WSBA #36931  
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Attorneys for Respondent

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On September 13, 2007, I caused to be served via Legal Messenger, **Defendant Bright Now! Dental, Inc.'s Petition for Review**, upon counsel of record as shown below:

**Attorneys for Plaintiffs:**

Lincoln C. Beauregard,  
Law Offices of John R. Connelly, Jr.  
2301 North 30th Street  
Tacoma, WA 98403

Dated this 13th day of September, 2007.

  
Kyna Gonzalez